Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MARK MORALES,

Petitioner,

v.

ROBERT AYERS

Respondent.

On Petition for Writ of Certiorari To the U.S. Court of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

WHETHER THE CONSTITUTION REQUIRES THAT THE HABEAS CORPUS ANTI-TERRORISM ACT'S ("AEDPA") STATUTE OF LIMITATIONS BE TOLLED DURING THE TIME THAT AN "IMPEDIMENT" TO TIMELY FILING IS CREATED BY UNLAWFUL STATE ACTION IN VIOLATION OF A PRISONER'S RIGHT TO "ACCESS TO THE COURTS".

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PETITION FOR A WRIT OF CERTIORARI

Petitioner MARK J. MORALES (hereafter "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, denying a Certificate of Appealability, which followed the dismissal of Petitioner's federal habeas corpus petition by the U.S. District Court for the Southern District of California.

OPINIONS BELOW

On July 21, 2000, the Court of Appeals for the Ninth Circuit denied Petitioner's application for Certificate of Appealability. Previously, Petitioner had been denied habeas corpus relief in the U.S. District Court. Prior to filing for federal habeas corpus relief, Petitioner's state habeas corpus petitions, which presented the same constitutional claims as his federal petition, had been denied by the California Superior Court (San Diego County), the California Court of Appeal (4th Appellate District, Division One), and the California Supreme Court. All lower court opinions are reproduced in the Appendix.

JURISDICTION

The denial of Petitioner's application for Certificate of Appealability by the Ninth Circuit effectively foreclosed Petitioner from all further relief other than application for certiorari to this Court. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court expressly held that the U.S. Supreme Court has jurisdiction under 28 USC § 1254(1) to review denials of applications for certificates of appealability by a court of appeals panel.

PROVISIONS OF LAW INVOLVED

The Anti-Terrorism and Effective Death Penalty Act (hereafter AEDPA) imposes a one-year statute of limitations for federal habeas corpus petitions filed by state prisoners. 28 USC § 2244(d). The AEDPA statute of limitations is tolled during the pendency of properly filed state habeas corpus petitions, and is also subject to "equitable tolling" if "extraordinary circumstances beyond a petitioner's control make it impossible to file a petition on time." See, e.g., *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). Denial of a first federal habeas corpus petition following a first and only set of state petitions for collateral relief is a particularly serious matter, requiring that federal courts proceed with caution. *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

The fundamental constitutional right of "meaningful access to the courts", guaranteed under the Due Process Clause, "prohibit[s] state prison officials from actively interfering with inmates' attempts to prepare legal documents ... or file them." *Lewis v. Casey*, 518 U.S. 343, 350 (1996). Similarly, the AEDPA expressly provides for tolling of the statute of limitations until the "date which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action". 28 USC § 2244(d)(1)(B).

STATEMENT OF THE CASE AND PERTINENT FACTS

Proceedings in trial court and on direct appeal.

Petitioner was convicted of one first and one second-degree murder based on two killings which occurred at a "rave" concert in the San Diego area. The trial court sentenced Petitioner to life without parole plus two additional consecutive life terms in prison. The California Court of Appeal affirmed the sentence of life without possibility of parole and one consecutive term of 15 years to life. Petitioner filed a petition for review in the California

Supreme Court which was denied on March 12, 1997.

Habeas corpus allegations.

Petitioner alleged the following facts in support of his state and federal habeas corpus petitions:

Petitioner, fresh from combat in Somalia and on leave from his Navy duties, attended a "rave" party in San Diego, at which the patrons ingested hallucinogenic drugs, listened to loud music, and "partied" into the early morning hours. Prior to attending the rave, Petitioner had ingested a powerful form of LSD. On the day of the rave, he had been subjected to a death threat by his girlfriend's former boyfriend, who was associated with a gang known as "SKA". During the course of the rave party, Petitioner was robbed at gunpoint by Tony Favela (aka "Tony Capone"), a notorious local thug, who had connections to this same gang. During the robbery, Favela was supported and egged on by a group of Hispanics. Petitioner managed to escape with his life by running away at full speed, during which time he became light-headed and experienced an "LSD flashback", which triggered hallucinations based on memories of being victimized by gang violence during his high-school years, and which brought on waves of intense fear and paranoia. Meanwhile, Petitioner was menaced again by a group of Hispanics whom he honestly (but possibly erroneously) believed to be part of the same group that had been egging on Favela during the armed robbery. Fearing that his life was in mortal danger, he hurriedly retrieved a shotgun from his vehicle and shot two of the individuals in the group, one a hulking 300-pounder and the other a much smaller individual.

Petitioner went to trial and was convicted of two counts of murder, one first-degree and one second-degree murder, with respect to the bigger and smaller individuals, respectively. Based on California law which imposes "special circumstances" for two murders, Petitioner was sentenced to

life without possibility of parole.

The sole defense at trial was a traditional self-defense, i.e., that Petitioner acted in "reasonable" fear of his life when he shot the two individuals whom he believed to be associated with Favela, who had just robbed him at gunpoint. The jury rejected that defense. However, trial counsel failed to pursue at all an alternative defense based on "imperfect self-defense" (also called "unreasonable self-defense"), which allows for murder to be reduced to manslaughter if the jury finds that the defendant "honestly" believed that he was acting in self-defense at the time of the killings, even though a "reasonable" person would not have done what the defendant actually did. Given Petitioner's history of being victimized by racial gang violence, resulting serious head injuries, and powerful LSD flashbacks at the time of the killings, there would have been massive evidentiary support for a defense based on "imperfect self-defense". Indeed, that was essentially the conclusion reached by Dr. Katherine DiFrancesca, a forensic psychologist who evaluated Petitioner for sentencing and concluded that Petitioner was likely delusional, but whose findings were, inexplicably, never used by defense counsel at trial. Furthermore, imperfect self-defense would have been consistent with the traditional self-defense theory pursued at trial, since both defenses are applicable when the defendant admits the killings but puts in issue only the required mental state. Finally, counsel's deficient performance was prejudicial, as a finding of manslaughter on either count would have prevented imposition of the "multiple murder" special circumstance.

Based on the above factual allegations, which are uncontradicted on the present record, Petitioner alleged three grounds for habeas corpus relief: (1) Petitioner was denied due process by the trial court's erroneous instructions, to which counsel failed to object, and which impaired Petitioner's ability to mount defenses of

"unreasonable self-defense" and "heat of passion", which were both supported by the evidence that was introduced at trial by the prosecution and the defense. (2) Defense counsel was ineffective in failing to develop and introduce abundant, readily available evidence that would have buttressed "unreasonable self-defense" assuming proper instructions. (3) Petitioner was denied a fair trial by the court's exclusion of the out-of-court statements of Favela, who had robbed Petitioner at gunpoint just before the shootings, and whose statements suggested an association with the two victims that the prosecution had heatedly challenged throughout the trial.

Neither of the first two arguments had been advanced at all on appeal by either trial or appellate counsel. The third argument had been advanced and denied on appeal solely on the basis of state evidentiary principles.

Exhaustion of remedies on state habeas corpus.

The California superior court denied the petition primarily on the ground that issues raised on direct appeal cannot be re-litigated on habeas corpus. (See, however, preceding paragraph, immediately above, indicating that none of the state habeas corpus claims had been raised at trial.) The Court of Appeal denied the petition on similar grounds. On Feb. 24, 1999, the California Supreme court summarily "denied" the petition on the merits. Thereafter, Petitioner filed his first and only petition for federal habeas corpus relief, based on the same facts and constitutional principles relied upon on state habeas.

Facts relating to AEDPA statute of limitations.

On March 12, 1997, the California Supreme Court had denied review on direct appeal. At that point, Petitioner had until June 10, 1998 (90 days plus one year) to timely file under the AEDPA, less any time tolled while exhausting his state habeas corpus remedies. 28 USC § 2244. Petitioner's

claims on habeas corpus were all claims that either were directly based on ineffectiveness of counsel or on counsel's failure to develop federal constitutional claims in the state courts, and none of the claims had been disclosed to him by his previous counsel. Petitioner, incarcerated for his first offense and lacking any legal training, was unable to discover these claims on his own until March of 1998, when his family was able to pay for and obtain consultation from an attorney specializing in post-conviction litigation. Within approximately 60 days thereafter, on May 22, 1998, Petitioner's state habeas corpus petition was delivered to the prison authorities for mailing, leaving him approximately one month remaining before the AEDPA statute of limitations would run. Between that date and February 24, 1999, when the California Supreme Court denied review of Petitioner's final state petition for writ of habeas corpus, Petitioner was pursuing his state remedies and the AEDPA statute of limitations was tolled. 28 USC § 2244(d)(2); *Nino v. Galaza*, 183 F.3d 1003 (9th Cir. 1999).

Meanwhile, in December of 1998, while Petitioner's state habeas corpus petition was still pending before the California Supreme Court, Petitioner took steps to prepare for the likely denial of the petition, so that he would be ready to file for federal habeas soon after he received it. Petitioner did not believe himself competent to prepare the federal petition because, even though the claims he would be making would be essentially the same as those he had made on state habeas corpus, the federal petition would have to be typed up and filed in federal court on the required federal form, and the state court denials would have to be shown to have been defective under the AEDPA. Accordingly, and with his immediate family having run out of money to pay for consultation with an attorney, Petitioner requested legal assistance from another prison inmate, Michael J. Thomas, a "certified paralegal" and "experienced 'jailhouse lawyer' ".

Mr. Thomas, who had been functioning as a jailhouse

lawyer for other inmates since 1995, was experienced in habeas corpus filings, and agreed that he would research, write, type up, and file Petitioner's federal habeas corpus petition for him within the month remaining on the AEDPA statute of limitations. However, because Mr. Thomas was aware that the California Supreme Court might cite "procedural defaults" that would have to be dealt with in any federal petition, Mr. Thomas insisted that he would not prepare the final draft of the documents until receiving and reviewing the actual denial from the California Supreme Court. Hence, in December of 1998, Petitioner gave his entire legal file to Mr. Thomas, consisting of his appellate briefs, his state habeas corpus petitions and supporting documents, the court opinions in his case, and all his other legal materials. In so doing, Petitioner was acting in full compliance with California prison regulations which had specifically permitted inmates to assist other inmates with legal filings, as a means for the California prisons to comply with the "access-to-the-courts" requirements imposed by this Court in *Lewis v. Casey, supra.*

On Feb. 24, 1999, the California Supreme Court denied the petition on the merits, without invoking any procedural defaults. Hence, all that needed to be done was for Mr. Thomas to type up and file the final draft of the federal habeas corpus petition on Petitioner's behalf in the month remaining under the AEDPA - something Mr. Thomas could easily have done if he had access to the law library, which is the only place where prisoners at Pelican Bay were allowed typewriter use or access to legal materials. However, during that entire critical period of time, Mr. Thomas - who was "white" - was locked down, as the result of a general lockdown of "whites" at Pelican Bay that began on Jan. 12, 1999, and continued until April 3, 1999. Thus, and because the prison authorities failed to allow Mr. Thomas any special dispensation from the lockout based on his "jailhouse lawyer" status, Mr. Thomas was unable to use the law library

to prepare and submit Petitioner's federal petition between the denial by the California Supreme Court (2/24/99) and the running of Petitioner's AEDPA statute of limitations (3/22/00).

Furthermore, during this same critical period of time, Petitioner was unable to prepare the federal petition himself because, even though Petitioner was not considered "white" - and therefore was not himself locked down - Mr. Thomas, his jailhouse lawyer, had his entire file, and that file was never returned to Petitioner after Mr. Thomas was locked down and denied law library privileges.

During the latter part of March 1999, after his one-month AEDPA window closed with no end in sight to the lockdown of Mr. Thomas or the return of Petitioner's legal file to him, Petitioner begged his family for assistance. They managed to obtain emergency funding sufficient to consult with the same outside lawyer who had advised Petitioner before in the preparation of his state habeas corpus petition, and who had kept a complete copy of Petitioner file, which could therefore be used to promptly prepare the federal petition even though Petitioner's own file was inaccessible. With this outside assistance, Petitioner's federal habeas corpus petition was filed only 4 days beyond the expiration of the AEDPA one-year limitation period.

After the petition was filed, Petitioner attempted to retrieve his file to further document the developments summarized above, but learned from the institution and from other inmates that a prison staff person had ordered the wholesale dumping and destruction of inmates' files, including the entire legal file belonging to Petitioner. (See declarations of other inmates Crook and Aragon re destruction of legal files by former staff person Richard Miles, pp. 2-5 of Exhibits in support of Traverse.) Because Mr. Thomas had been in possession of Petitioner's files prior to the lockdown and before their destruction, the inescapable inference is that, when the prison authorities confiscated

Petitioner's files from Mr. Thomas , they failed to return them to Petitioner and instead allowed them to be destroyed.

Dismissal of the federal habeas corpus petition and denial of applications for Certificate of Appealability

Concurrently with its answer, Respondent moved to dismiss the petition on the basis that it was filed after the AEDPA's 1-year statute of limitations had expired. The motion was referred to a magistrate, who recommended dismissal on the basis that Petitioner had not sufficiently established tolling for the 4 days that the magistrate determined the petition to have been late under the AEDPA. Petitioner filed objections to the magistrate's recommendation which were unavailing. On Nov. 4, 1999, the District Court entered a judgment adopting the magistrate's report and recommendation in its entirety and dismissing the writ of habeas corpus with prejudice.

On Dec. 3, 1999, concurrently with a timely Notice of Appeal from the judgment of dismissal, Petitioner unsuccessfully applied for a Certificate of Appealability ("COA") from the District Court. Thereafter, pursuant to Circuit Rule 22-1, Petitioner timely moved in the circuit court for issuance of a COA. On July 21, 2000, the request for COA was denied by the circuit court. The petition for certiorari in this court timely follows within 90 days of the Circuit Court denial of the COA application.

REASONS FOR GRANTING THE PETITION

PETITIONER MUST BE GRANTED TOLLING FOR THE 4 DAYS THAT HIS PETITION WAS "LATE" UNDER THE AEDPA, BECAUSE THE LATENESS WAS THE DIRECT RESULT OF AN UNCONSTITUTIONAL IMPEDIMENT TO FILING CREATED BY UNLAWFUL GOVERNMENTAL ACTION, IN VIOLATION OF

PETITIONER'S RIGHT TO "MEANINGFUL ACCESS TO THE COURTS".

A. The Constitution guarantees "Meaningful Access to the Courts"

In *Johnson v. Avery*, 393 U.S. 483 (1969), this Court upheld the "fundamental importance of the writ of habeas corpus in our constitutional scheme", and the principle that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at p. 485. The Court found that these fundamental principles applied to prohibit unreasonable restrictions on "jailhouse lawyers", and that "for all practical purposes if ... prisoners cannot have the assistance of a 'jailhouse lawyer', their claims will never be heard in any court." *Id.*, at p. 487. Consequently, the Court struck down Tennessee regulations which did not provide "an available alternative to the assistance provided by other inmates", based on the principle that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Ibid.*

In *Bounds v. Smith*, 430 U.S. 817 (1977), relying on *Johnson v. Avery*, this Court explained that "it is now established beyond doubt that prisoners have a constitutional right of access to the courts,", and reiterated that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Bounds, supra,* at pp. 821-822. Furthermore, the *Bounds* court held that access to the courts was not only guaranteed in the abstract, but that such access had to be "adequate, effective, and meaningful." *Id.*, at p. 822. Applying these principles, the Court emphasized the importance of affording inmates *meaningful* access to law libraries and legal assistance, because a pro se prisoner preparing a habeas corpus petition needs practical access to legal resources as much, or more, than a private

lawyer:

> Although it is essentially true ... that a habeas corpus petition ... need only set forth facts giving rise to the cause of action ... it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties ... and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. [¶] If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner. Indeed ... it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the cases if it is deemed frivolous.

Bounds, supra, at pp. 825-826. Accordingly, *Bounds* squarely held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id,* at p. 828.

In *Lewis v. Casey, supra,* 518 U.S. 343 [hereafter "*Lewis*"], this Court upheld the vitality of the "already well-established right of access to the courts ... prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents or file them." *Lewis,* at p. 351. Similarly, *Lewis* continued to emphasize that "meaningful access to the courts is the touchstone". At the same time, the *Lewis* court declined to impose any arbitrary requirements for prison law libraries or legal assistance in all cases,

limiting the right of prisoners' access to the courts to the tools needed to "attack their sentences"; and requiring a showing of "actual injury", and a consideration of "legitimate penological interests." *Id.*, at 360.

B. The failure of the California prison authorities to carry out mandatory prison regulations enacted to effectuate the *Lewis* guarantees, constitutes illegal state action.

In direct response to *Lewis*, the California Department of Corrections promulgated the rules and regulations which are at issue in the instant case, emphasizing:

> The Department takes its obligation to provide Constitutionally adequate access to the courts for inmates seriously. The *Lewis v. Casey* opinion effectively overruled lower court decisions which had guided the Department in the scope of its programs regarding access to the courts. With the Supreme Court's clarification, the Department is positioned to *reevaluate the allocation of its resources to programs designed to satisfy inmates' Constitutional right of access to the courts.*

(See Notice of Change to Director's Rules, "Initial Statement of Reasons", included in Exhibits Supporting Petitioner's Declaration in Support of Traverse, page 9 [emphasis added].) Continuing in this vein, the Department specifically promulgated the following regulations summarized below (excerpts from the actual regulations are reproduced on the last page of the Appendix).

> § 3000: Defines "initial pleadings" with regard to which access to the courts is guaranteed to include "petition for writ of habeas corpus"; requires "paging" ("delivery of requested and available law library material") to any inmate who lacks physical access to the law library.

§ 3122: Requires prison to promptly provide physical access to law books or paging services to all prison inmates who are attacking their sentences and facing "initial filing deadlines".

§ 3160: This section, entitled "Inmate Access to the Courts", provides that the rights spelled out in § 3122 "shall not be obstructed."

§ 3163: "Assisting Other Inmates". Section provides that "inmates are not restricted from assisting another inmate in the preparation of any kind of legal work ... [except that no compensation can be required]." Further provides that "legal papers, books, opinions and forms being used by one inmate to assist another may be in the possession of either inmate"; and that: "All papers must be returned to the respective owners when ... administrative action prevents direct communications between the inmates." Concludes with statement that "Inmates shall not be barred from giving or receiving legal assistance for violations of regulations and procedures which are unrelated to providing or receiving legal assistance."

§ 3343. Provides that, if an inmate's housing restricts him or her from going to the inmate law library, arrangements shall be made to deliver legal materials to the inmate.

Taken together, these regulations *required* that the prison authorities protect Petitioner's right of access to the courts, by either granting Petitioner's jailhouse lawyer an exemption from the lockdown's prohibition on law library use, or by retrieving Petitioner's legal files from his jailhouse lawyer and promptly returning them to Petitioner. Nevertheless, *none* of this was done: Instead: (1) Mr. Thomas was provided with no access to the law library or any paging services during the several-month lockdown. (2) Petitioner's legal file was not returned to him promptly after prison authorities

seized it from Mr. Thomas; rather, the whole file was *destroyed* at the directions of a prison guard who was subsequently fired.

Federal cases pre-dating *Lewis v. Casey* have long held that when prison authorities deprive prisoners of the means of filing critical legal documents, this constitutes "state action" which violates the Constitution. For example, in *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) this Court warned that, "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." Lower federal courts similarly have held that state action which violates the right of access to the courts is unconstitutional, such where prison officials deprive prisoners of necessary legal materials, *Sigafus v. Brown*, 416 F.2d 105, 107 (7th Cir. 1969) ["the deprivation of materials necessary to afford reasonable access to the courts violates the Due Process Clause of the Fourteenth Amendment"]; where prison authorities confiscate a prisoner's legal files, see *Morello v. James*, 810 F.2d 344, 347 (2nd Cir. 1987) ["Surely the state cannot satisfy this obligation {to afford access to the courts} by providing a prisoner access to the legal resources necessary to prepare his case and then depriving him of his pro se work product."]; or where prison authorities unreasonably restrict access to "jailhouse lawyers", see *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989) [the Constitution "prohibits prison officials from unreasonably limiting access to ... other prisoners who can provide legal advice."].

Lewis v. Casey reinforces the basic principle that depriving prison inmates of meaningful access to the courts violates rights that are "protected by the First, Sixth and Fourteenth Amendments". *Lewis, supra*, 505 U.S. at 346. Moreover, *Lewis* applies this principle both by "prohibiting state prison officials from actively interfering with inmates' attempts to prepare legal documents ... or file them", *id.* at 350; and by

affirming that "the fundamental constitutional right of access to the courts requires prison authorities to *assist* inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law". *Id., at* 346 [emphasis added].

Given that *Lewis* prohibits active interference with prisoner filings and requires prison authorities to "assist" prisoners in the filing of meaningful legal papers, it necessarily follows that authorities who violate regulations designed to guarantee inmates access to the courts are necessarily engaging in State action prohibited by the Constitution.

C. State action in violation of the *Lewis* guarantees cannot constitutionally be permitted to cause the running of the AEDPA statute of limitations.

I a recent 11th Circuit case, the court in *Atkins v. United States*, 204 F.2d 1086 (11th Cir. 2000), analyzed "equitable tolling" of the AEDPA as a separate and distinct inquiry from that which focuses on an alleged "unconstitutional impediment" which arises in the *Lewis* context of State action which impedes access to the courts. Discretely addressing the latter issue, the *Atkins* panel drew a direct connection between the denial of access to the courts prohibited by *Lewis* and the subsection of the AEDPA which requires that the statute of limitations be tolled until a state-created "impediment" to timely filing is removed. In part "B" of the *Atkins* opinion, entitled "Unconstitutional impediment", the court states, *id.* at 1089:

> Apart from equitable tolling, as adopted by the courts, the one-year limitation ... can run not only from the date of the final conviction, but also from "the date on which the impediment to making a motion created by governmental action in violation

> of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." ..... The inmate must show that this inability caused an actual harm, or in other words, unconstitutionally prohibited him from exercising that fundamental right of access to the courts in order to attack his sentence ...

Although the court in *Atkins* found on the facts there that the petitioner had not made an adequate showing of "unconstitutional impediment" (because Mr. Atkins had shown merely that there was a prison lockdown but no causal connection between the lockdown and the failure to timely file under the AEDPA), *Atkins* makes clear that, in an appropriate case, a factual showing of "unconstitutional impediment" to filing within the AEDPA limitations period would necessitate relief from the statute of limitations.

Unfortunately, apart from *Atkins* itself, there appear to be no reported cases to date which contain fact-specific analyses of the relationship between the *Lewis* guarantees and the AEDPA's provision for tolling until a State-created impediment to timely filing is removed. Given the 1996 vintage of both the AEDPA and *Lewis*, this is not too surprising. At the same time, fact-specific analogies can be gleaned from certain cases involving claims of "equitable tolling" of the AEDPA statute of limitations. Virtually all of the circuit courts have been called upon to determine whether "equitable tolling" applies to the AEDPA generally, and those courts have uniformly found that equitable tolling applies in principle to the AEDPA, although many of those same courts refused to allow tolling in a given case because of factual deficiencies in the petition. See, e.g., cases collected in *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999), fn.11. That process has resulted in a number of reported cases which do contain fact-based analyses of whether a given petitioner has been "prevented in some extraordinary way from asserting

his rights" or has been victimized by "extraordinary circumstances beyond a prisoner's control", and several of those cases involve allegations of lockdowns, interference with mail delivery, limitations on law library use, and other forms of action by prison authorities which potentially impact access to the courts. Hence, while the equitable tolling cases are not necessarily controlling as to whether a *Lewis* violation has occurred sufficient to toll the AEDPA statute of limitations, they do contain factually analogous inquiries that are helpful in determining whether access to the courts has been denied in a given case, such that the AEDPA statute of limitations must be tolled.

Turning to these equitable tolling cases for guidance here, *Valverde v. Stinson*, 224 F.3d 129 (2nd Cir. 2000) affords relief in a situation strikingly similar to that here. In *Valverde*, petitioner's state conviction became final on March 6, 1996, 90 days after his state habeas corpus petition was denied. Under present law, that would have allowed him until March 6, 1997 in which to file under the AEDPA, but he did not file until May 6, 1997, about two months late. Moreover, even though the 1-year "grace period" allowable for the first year after the AEDPA took effect would have allowed him until April 24, 1997, within which to timely file, the filing on May 6, 1997, would still have been 12 days late. The lower court dismissed the petition as untimely under the AEDPA, but the Second Circuit reversed on the basis that Valverde should have been granted equitable tolling for the period that his habeas corpus petition and related legal papers were "confiscated" by a prison guard.

Valverde stated in his declaration that, during April of 1997, he had become aware of the AEDPA limitations period; that he had completed the form for filing a federal habeas corpus petition and had sent it to the law library to be typed by another inmate; but that "a Correction officer ... confiscated my legal papers from another inmate in SHU and never returned them to me." Valverde completed a new

form but did not send it to the court until May 6, 1997 - 12 days late under the "grace period" analysis. The Court of Appeal for the Second Circuit found that the correctional officer's "confiscation" of Valverde's file was "extraordinary as a matter of law." *Id.*, at 133, citing *Morello v. James*, 810 F.2d 344, 347 (2nd Cir. 1987).) Then, in language particularly pertinent here, the court found that

> ... *Internal obstruction of a prisoner's access to the courts by means of confiscating his legal work product is "precisely the sort of oppression that violates the Fourteenth Amendment.* " And a person is plainly "prevented" from filing a pleading for some period of time if he is deprived of the sole copy of that pleading, something that petitioner asserts happened to him here .... [¶] We conclude that if an act of confiscation such as that alleged by Valverde prevents a petitioner from filing before the ordinary limitations period expires, the tolling period must be sufficient to permit the filing of the petition on or before the earlier date after the act of confiscation by which that petitioner, acting with reasonable diligence, should have filed his or her petition.

Valverde v. James, supra, at p. 134 [emphasis added]. Thus, and finding that the confiscation of Valverde's file constituted "misconduct" which "prevented him from filing his federal writ of habeas corpus within the one year period of limitation", the Second Circuit held that "on this record the district court should have denied respondent's motion to dismiss." *Id.*, at 135. Accordingly, the Court of Appeal reversed and remanded for an evidentiary hearing or other proceedings for the court "to develop further the facts relevant to Valverde's claim that his legal papers were confiscated, that the confiscation prevented him from filing on time, and that he filed his petition within a acceptable time after the confiscation." *Ibid.*

Finally, before ordering the matter back to the district

court, the Court of Appeal took pains to emphasize for the district court's benefit that:

> *Valverde is not ineligible for equitable tolling simply because he waited until late in the limitations period to file his habeas petition.* He would have acted reasonably by filing his petition any time during the applicable one-year period of limitations .... A petitioner should not be faulted ... for failing to file early or to take other extraordinary precautions early in the limitations period against what are, by definition, rare and exceptional circumstances that occur later in that period.

Valverde, supra, at 136 [emphasis added]. The italicized language above is especially pertinent here, because one of the principal reasons why the district court refused to allow tolling in the instant case was that the confiscation of Petitioner's file by prison authorities occurred during the last few weeks of the otherwise applicable AEDPA limitations period.

The facts in Petitioner's case are strikingly similar to those in *Valverde,* where tolling was deemed required by the Fourteenth Amendment:

As in *Valverde,* Petitioner's file was confiscated by prison officials while it was legitimately in the hands of another inmate (in our case, the "jailhouse lawyer", Mr. Thomas). As in *Valverde,* the prison officials should have returned the file to Petitioner, but instead "wrongfully" (in our case, not only "wrongfully" but "illegally" as well) confiscated it and never returned it to Petitioner, thereby directly impeding his right to access to the courts. As in *Valverde,* Petitioner acted diligently after the confiscation to get a petition on file within a very short time after the AEDPA limitations period ran – indeed, Petitioner was only 4 days late, compared with Valverde, whose petition was 12 days late.

In sum, although *Valverde* was adjudicated as an equitable tolling case rather than as an "access-to-the-courts

case" -- Valverde claimed that "the confiscation of his legal papers was an unconstitutional impediment to filing, created by State action, that prevented him from filing on time" [*Valverde, supra,* at 136], but the Court of Appeal expressly declined to address that particular claim because it was not one of the issues encompassed by the Certificate of Appealability - the facts here are indistinguishable from those in *Valverde;* and for the same legal and policy reasons as applied there, Petitioner is entitled to tolling here for the four days that his federal petition was late as a direct result of his file having been wrongfully "confiscated" by prison authorities.

Although diligent research has not disclosed any other equitable tolling cases more closely in point here than *Valverde,* there are a number of other decisions which suggest that tolling is required under the AEDPA where a pro-se prisoner *relies* on prison authorities who fail to carry out their duties, and this failure results in a late filing under the AEDPA. See, e.g., *Miles v. Prunty, supra,* 187 F.3d 1104, 1107 (9th Cir. 1999) [prison authorities did not, as requested by petitioner, write a check against his prison account for the filing fee; as a result, the petition was returned by the clerk's office and was filed about 2 months late]; see also *Phillips v. Donnelly,* 216 F.3d 508 (5th Cir. 2000) [tolling allowed following delay of 4 months before prison authorities delivered notification that appeal had been denied].

Moreover, many of the cases which deny tolling in given cases do so by illustrating what types of claims are *not* sufficiently "rare and exceptional" to warrant relief, thereby suggesting by negative implication that there are some kinds of extraordinary circumstances which will, if sufficiently compelling, require tolling of the AEDPA statute of limitations. Such extraordinary circumstances, which are all present here, include the following:

(1) Prison authorities engaged in unlawful state action in

violation of regulations designed specifically to afford inmates meaningful access to the courts.

In specific response to the requirements imposed by *Lewis v. Casey*, the California prison authorities here promulgated regulations which effectively defined what the prison had to do to guarantee prisoners access to the courts. These prison regulations expressly approved the practice of prisoners using the services of other inmates to assist them with the preparation of critical legal documents such as first habeas corpus petitions. Such an alternative was obviously inferior to the prison providing lawyers or legal assistants to help prisoners with their habeas corpus petitions, but it was also far less expensive, and *Lewis* permits prisons to satisfy their obligation to assist prisoners with access to the courts by selecting options that are less than the optimum. On the other hand, *Lewis* does establish a constitutional imperative – that prison authorities "assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate legal assistance from persons trained in the law." Hence, while allowing the use of "jailhouse lawyers" to assist prisoners can be a valid response to the *Lewis* obligation, it is only so to the extent that those same jailhouse lawyers are allowed the limited exemption from lockdown restrictions on law library use, without which their services are rendered useless. The California prison regulations enacted to comply with *Lewis* so recognized, by specifically allowing for inmates to assist other inmates with their legal filings; by providing that the jailhouse lawyers would be able to obtain the files of the prisoners they were assisting; and by requiring that, if jailhouse lawyers were to be locked down, either they would be given special law library dispensation to handle their "cases", or the prisoners' files in their possession would be promptly returned to their owners. Here, however, when Petitioner's jailhouse lawyer was locked down along with all

"whites" for a period of several months, the prison authorities confiscated Petitioner's legal files and, in violation of their own *Lewis* regulations, failed to return them to Petitioner and instead allowed them to be destroyed. This conduct effectively deprived Petitioner of his right to access to the courts by unlawful State action. (Compare *United States v. Cicero*, 214 F.3d 199, 204 (D.C. Cir. 2000) [actions by state officials "were not unlawful"].)

(2) The unlawful state action occurred at a critical time in the AEDPA filing process.

Petitioner had about a month remaining on his AEDPA statute of limitations after his petition was denied by the California Supreme Court, more than sufficient time for Petitioner's jailhouse lawyer to have prepared, typed, and filed the final draft of the petition with the District Court. At the same time, the period following the denial of the petition by the California Supreme Court was absolutely critical to the filing of a timely federal habeas corpus petition. Yet it was during this same critical period that the prison authorities created the illegal impediment to timely filing by seizing Petitioner's legal files from his jailhouse lawyer and by allowing them to be destroyed instead of promptly returned to Petitioner. (Compare *Fisher v. Johnson*, 174 F.3d 710 (5th Cir. 1999) ["If this event had occurred shortly before the required filing, Fisher would have had a stronger case."])

(3) Petitioner acted diligently after the impediment occurred and filed his federal petition within a few days of the one-year AEDPA period.

After the one-year AEDPA period ran, Petitioner immediately sought the help of his family, who were able to raise emergency funds to obtain assistance from an outside lawyer. With this assistance, Petitioner was able to file his

federal habeas corpus only *four days* late. This extremely short delay contrasts starkly with the delays of several months or more that are so common in the cases which find the facts insufficient to justify equitable tolling. (Compare *Miller v. Marr*, 141 F.3d 976 (10th Cir. 19980 [15-month delay]; *Hendon v. Lamarque*, 2000 U.S. Dist. Lexis 12743 (U.S.D.C.N.D.Cal. 8/25/00) [petitioner waited 1 year after released from lockdown to file].)

(4) Petitioner acted diligently before the impediment occurred.

All of the claims Petitioner made in his state and federal habeas corpus petitions were claims based on ineffectiveness of counsel and/or claims that his trial and appellate lawyers had overlooked or concealed from Petitioner. Without legal training, Petitioner could not reasonably discover these claims before his family raised funds to consult with a lawyer specializing in post-conviction remedies, which was done well within the AEDPA limitations period. Moreover within approximately 60 days of the date outside counsel was consulted, and well within the year allowed under the AEDPA, Petitioner filed his state corpus petitions and promptly filed and re-filed at each level of the state system until his state remedies were exhausted. (Compare *Atkins v. Harris*, supra, 204 F.3d 1086 [delay of over 5 years before lockdowns].)

(5) Petitioner's allegations are specific and documented.

Petitioner's declaration, corroborated by a comprehensive set of official prison memos, regulations, and other documents, established the exact days that his jailhouse lawyer was locked down, the precise restrictions imposed by the lockdown, and the regulations that were breached by prison authorities. He also submitted detailed

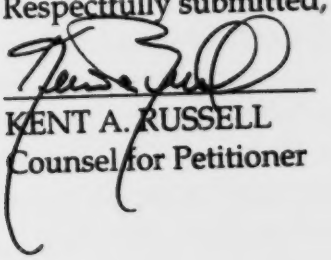
declarations from himself and other inmates attesting to the destruction of his file by a renegade prison guard who was later discharged. This strong showing demonstrated a clear nexus between the unauthorized actions by prison authorities and Petitioner's inability to file his federal petition with the AEDPA limitations period. (Compare the terminally vague allegations in *United States v. Van Poyck*, 980 F.Supp.1108 (C.D.Cal. 1997).)

CONCLUSION

Based on the foregoing, the petition for certiorari should be granted.

Dated: December 3, 2000.

Respectfully submitted,



KENT A. RUSSELL
Counsel for Petitioner

APPENDIX

Mark Morales v. Robert Ayers

Pages	Court	Title of Document
i-iii	Superior Court, State of California	Order Denying Petition for Writ of Habeas Corpus
iv-v	California Court of Appeal, 4th App. Dist., Div. 1	Order by "THE COURT" denying petition for writ of habeas corpus
vi-xiiI	U.S. District Court, So. Dist. of California	Report and Recommendation Regarding Dismissal of Petition for Writ of Habeas Corpus
xiv-xxv	U.S. District Court, So. Dist. of California	Order Adopting Magistrate Judge's Report and Recommendation; Dismissing Petition for Writ of Habeas Corpus; Terminating Case
xxvi-xxxi	U.S. District Court, So. Dist. of California	Order Denying Application for Certificate of Appealability
xxxii	U.S. Court of Appeals for the Ninth Circuit	Order (denying application for certificate of appealability)
xxxiii	California Code of Regulations, Title 15	Excerpts from regulations on "Crime Prevention and Corrections, Division 3, Department of Corrections

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

FILED
June 29, 1998
BY: M. SIRNA, Deputy

IN THE MATTER OF THE PETITION OF:	HC 15577 SCD 104876 CD 105402
MARK J. MORALES, Petitioner.	**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

THIS COURT, HAVING READ AND CONSIDERED THE PETITIONE FOR WRIT OF HABEAS CORPUS, AND THE FILE IN THE ABOVE CAPTIONED MATTER, FINDS AS FOLLOWS:

On July 25, 1995 Petitioner was found guilty by jury trial of second degree murder, pursuant to Penal Code § 187(a), and first degree murder pursuant to Penal Code § 187(a). On September 27, 1995, Petitioner was sentenced to life in prison without the possibility of parole.

Petitioner contends that he was denied due process and a fair trial. He contends the court erred 1) by excluding the statements. against penal interests of unavailable declarant Tony Favela; 2) by giving an incorrect voluntary manslaughter instruction; 3) by refusing to give CALJIC 2.25 Refusal of Witness to Testify

—Exercise of Privilege Against Self-Incrimination; and, 4) by imposing a sentence of 25 years to life without the possibility of parole.

Second, Petitioner claims that he had ineffective assistance of counsel. He asserts that his failed to investigate, develop and present available evidence and expert testimony that would have convinced the jury that he had reasonably acted in self-defense. As a result, Petitioner claims this violated his 6th and 14th amendment rights and was prejudicial to a conviction of the lesser charge of manslaughter, which would have made him eligible for parole.

The issues raised by the Petitioner with respect to his claim that he was denied due process and a fair trial cannot be addressed through this Petition. Habeas corpus cannot serve as a second appeal, as matters that were raised and rejected on appeal are foreclosed from relief on habeas corpus. (In re Huffinan (1986) 42 Cal.3d 552, 554-55; In re Terry (1971) 4 Cal.3d 911, 927). All of the issues raised by the Petitioner with regard to due process and a fair trial were raised during his appeal. The Court of Appeal specifically ruled on each of those issues. Therefore, Petitioner is precluded from any type of remedy through this process.

With respect to the Petitioner's second contention, there is a two prong test that must be met in order to prove ineffective assistance of counsel. First, Petitioner must show that counsel's representation was deficient, in that it "fell below an objective standard of reasonableness.. under prevailing professional norms. "(People v. Ledesma (1987) 43 Cal.3d 171, 216; citing Strickland v. Washington (1984) 466 U.S. 668, 688) Petitioner does not show that his attorney's conduct was below professional standards. He merely asserts that his attorney did not seek to admit particular evidence relating to his background and moral character.

However, the attorney's decision to exclude such

evidence is a tactical decision, and is not indicative of deficient representation.. "Strategic decisions made by counsel after a reasonable investigation into the alternative should be given deference by the courts." (People v. Pennsinger (1991) 52 Cal.3d 1210, 1280.)

Second, the Petitioner must show that, if counsel's performance is shown to be deficient, the Petitioner must show that the deficient performance prejudiced his defense. (Strickland, supra, 466 U.S. at P.687 [80 L.Ed.2d at p.693; Ledesma, supra, at p.216.) Since, Petitioner fails to demonstrate that his attorney's performance was inadequate, he did not meet the burden of proving that he had ineffective assistance of counsel.

Therefore, the Petition for Writ of Habeas Corpus is denied for the above-stated reasons. It is further ordered that a copy of this order be served on the Petitioner, San Diego District Attorney and the Department of Corrections.

IT IS SO ORDERED.

DATED: 6/29/98

s/ WILLIAM D. MUDD
JUDGE OF THE SUPERIOR COURT

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE

STATE OF CALIFORNIA

In re MARK J. MORALES	)	
	)	D031458
on	)	(San Diego
	)	County)
Habeas Corpus.	)	
	)	Super.Ct.No.
	)	SCD104976
_____	)	

THE COURT:

The petition for writ of habeas and supplement been read and considered by Justices Benke, Haller and McDonald. We have taken judicial notice of the direct appeal D 024776. (Evid. Code, § 459.)

A jury found Mark Jonathan Morales (Morales) guilty of first and second degree murder with personal firearm use and a multiple murder special circumstance. Morales appealed, claiming evidentiary, instructional and sentencing error. We affirmed the judgment on December 12, 1996, modifying Morales's sentence to life without possibility of parole for first degree murder, consecutive to the term of 15 years to life for second degree murder. The Supreme Court denied Morales's petition for review on March 12, 1997.

Morales petitioned for habeas corpus relief in superior court, claiming the trial court erred (1) by excluding statements against penal interest of unavallable declarant Tony Favela, (2) by giving an incorrect voluntary manslaughter instruction, (3) by refusing to give CALJIC

2.25, and (4) imposing a sentence of 25 years to life without the possibility of parole. Morales also claimed trial counsel was ineffective for failing to present evidence he had reasonably acted in self–defense. The superior court denied the petition on June 29, 1998 (HC 15577).

By this petition, Morales challenges our decision on direct appeal. He also faults trial counsel for failing to present evidence he was bullied as a child and used LSD for years, including at the time of the crime, to support a claim of unreasonable self-defense. Morales asserts counsel should have introduced a psychological evaluation prepared after trial to support that defense. He also provides a declaration by investigator Marion Pasas stating he interviewed inmate Misael Galvis showed him a letter from Galvis' 5 attorney to Morales's attorney on appeal and Galvis ratified statements he purportedly made to his attorney that he saw a handgun given to a security guard at the murder scene.

Morales's claims of error which were raised and rejected on direct appeal may not be revisited on habeas corpus. (In re Harris (1993) 5 Cal.4th 813, 825.) Morales has not shown trial counsel was ineffective for failing to offer evidence of Morales's "critical personal background facts" because the "facts" are not exculpatory and it is not reasonably probable the outcome would have been different. (See Strickland V. Washington (1984) 466 U.S. 668, 688.) Morales's claim of new evidence from Misael Galvis by way of investigator Pasas is multiple inadmissible hearsay and cumulative to evidence presented at trial that a weapon other than the shotgun used by Morales was at the scene of the murders.

The petition is denied.

s/ BENKE, Acting P.J.

Copies to: All parties

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FILED
AUG. 2, 1999
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK J. MORALES,	) Civil No.
	) 99-0654-TW (LSP)
Plaintiff,	)
	) REPORT AND
v.	) RECOMMENDATION
	) REGARDING DISMISSAL
ROBERT AYERS, Warden,	) OF PETITION FOR WRIT
	) OF HABEAS CORPUS
Respondent.	)
_____	)

Mark J. Morales ("Petitioner") , a state prisoner proceeding pro se, has filed a Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The Court having reviewed Petitioner's Petition, Respondent's Answer, Petitioner's Traverse and Petitioner's Declaration in Support of his Traverse, finds that Petitioner is not entitled to the relief requested and recommends that the Petition For Writ Of Habeas Corpus be DENIED.

I
PROCEDURAL HISTORY

On July 25, 1995, a jury found Petitioner guilty of first degree murder and second degree murder. The jury further found that Petitioner had personally used a firearm in the commission of each count. On September 27, 1995, Petitioner was sentenced to imprisonment for

life without the possibility of parole. It was also .ordered that he serve two additional consecutive terms of life in prison.

On February 13, 1996, Petitioner appealed his conviction and sentence to the California Court of Appeal, Fourth Appellate District. (Respondent's Lodgement No. 6) . On December 12, 1996, the Court of Appeal affirmed Petitioner's convictions, but modified his sentence to reflect a term of lire in prison without the possibility of parole plus one consecutive term of fifteen years to life. (Respondent's Lodgment No. 7) . On January 14, 1997, Petitioner filed a Petition For Review with the California Supreme Court. (Respondent's Lodgement No. 8) O n March 12, 1997, the California Supreme Court denied Petitioner's Petition For Review. (Respondent's Lodgment No. 9) .

On June 2, 1998, Petitioner filed a Petition For Writ Of Habeas Corpus in the San Diego Superior Court. (Respondent's Lodgement No. 11) . On June 29, 1998, the Superior Court denied Petitioner's Petition. (Respondent's Lodgment No. 13) .

On July 2, 1998, Petitioner filed a Petition For Writ Of Habeas Corpus with the California Court of Appeal, Fourth Appellate District. (Respondent's Lodgement No. 14) . On August 13, 1998, the Court of Appeal denied Petitioner's Petition. (Respondent's Lodgement No. 15)On August 20, 1998, Petitioner filed a Petition for Writ of Habeas corpus with the California Supreme Court.

On February 24, 1999, the California Supreme Court denied Petitioner's Petition. (Respondent's Lodgement No. 17. On April 2, 1999, Petitioner filed a Petition For Writ Of Habeas Corpus with this Court.

II

PETITIONER'S PETITION IS BARRED BY THE STATUTE OF LIMITATIONS

1. The AEDPA's One-Year Statute of Limitations.

Respondent argues that the Petition is barred by the Antiterrorism and Effective Death Penalty Act's ("the AEDPA") statute of limitations. The provisions of the AEDPA apply to petitions for writs of habeas corpus filed in federal court after the AEDPA's effective date of April 24, 1996. Lindh v Murphy, 521 U.S. 320, 117 S. Ct. 2059, 2068 (1997) . Therefore, because the Petition was filed on April 2, 1999, the AEDPA applies to this case.

Prior to the enactment of the AEDPA on April 24, 1996, "state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition." Calderon v. United States Dist. Court (Beeler) 128 F.3d 1283, 1286 (9th Cir. 1997) , cert denied, 118 U.S. 897 (1998), overruled on other grounds by Calderon v. United States Dist Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) . '[D]elays of more than a decade did not necessarily bar a prisoner from seeking relief." Id.

With enactment of the AEDPA, a state prisoner's time frame for seeking federal habeas relief was dramatically limited. The AEDPA amended 28 U.S.C. § 2244 by, in part, adding subdivision (d) , which provides for a one-year limitation period for state prisoners to file habeas corpus petitions in federal court. Section 2244 Cd) states, in pertinent part:

(d)(1)A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
(B) the date on which the impediment to filing

an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection . 28 U.S.C.A. § 2244(d) (West Supp. 1998).

Petitioner does not argue that section 2244(d) (1) subparts (B), (C) or (D) apply in this case. Thus, the language of the AEDPA suggests that, in Petitioner's case, the AEDPA's one-year statute of limitations began to run at the conclusion of direct review. 28 U.S.C. § 2244(d)(1)(A). Direct review of Petitioner's judgment concluded on June 10, 1997, ninety days after the California Supreme denied Petitioner's Petition For Review on March 12, 1997.

---------- FOOTNOTES ----------

1. Petitioner signed the first petition on May 22, 1998.
2. Petitioner states that he received notification of the California Supreme Court's denial of his last petition on March 3. 1999. See Petitioner's Traverse at 4.
3. See Houston v Lack 487 U.S. 266. 270-271, 108 S. Ct. 2379 (1988) ; Nichols v. Bowersox 1999 WL 203482, 5-9 ("mailbox rule" applies to the filing of a federal petition); Jones v. Bertrand 171 F.3d 499, 500-502 (7th Cir. 1999); Spotville v. Cain 149 F.3d 374, 376-377 (5th Cir. 1998);

Burns v. Morton 134 F.3d 109, 112-113 (3rd Cir. 1998); see Faile v. Upjohn Co. 988 F.2d 985, 988, n.4, 988-989 (9th Cir. 1993; In re Jordan 4 Cal. 4th 116, 129-130 (1992) ("prison delivery rule").

4. See Footnote 2.0

---------- END FOOTNOTES ----------

See Smith v. Bowersox, 159 F.3d 345 (8th Cir. 1998) (holding that the statute of limitations under section 2244(d) (1) (A) is triggered by the conclusion of all direct appeals in the state system followed by the expiration of the time for filing a petition for certiorari in the United States Supreme Court, if a petition is not filed); Supreme Ct. R. 13(1) (providing that a petition for writ, of certiorari must be filed within 90 days after entry of judgment) .

Therefore, absent tolling, Petitioner had until June 10, 1998, to file his Petition For Writ of Habeas Corpus with this court However, Petitioner filed three petitions for post-conviction relief in the California Superior, Appellate and Supreme Courts. The AEDPA statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects petitioner's final collateral challenge. The statute of limitations is not tolled from the time a final decision is issued on direct state appeal and the time the first state collateral challenge is filed because there is no case "pending" during that interval. Nino v Ga1aza 1999 WL 451783 (9th Cir. July 6, 1999) .

In this case, Petitioner's first petition for post-conviction relief was filed on June 2, 1998.1 The last petition was denied by the California Supreme Court on February 24, 1999.2 Giving Petitioner the benefit of the "mailbox rule" and the "prison delivery" rule, which deems petitions filed at the time petitioner hands them to prison officials for delivery,3 the statute of limitations was not tolled for 346 days (from March 3, 1999, the date Petitioner received the denial of his petition by the

California Supreme Court, to march 26, 1999, the date he signed his petition filed with this court.

Since the statute of limitations was not tolled for a total of 369 days (346+23). Petitioner failed to file his Petition For Writ of Habeas Corpus with this court within the one-year statute of limitations mandated in 28 U.S.C. §2244(d)(1)(A).

2. Equitable Tolling.

The AEDPA's one-year statute of limitations is subject to equitable tolling. Beeler, 128 F.3d 1283 fn.2. However, the Ninth Circuit in Beeler noted that "equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstanced' beyond a prisoner's control make it impossible to file a petition on time." Id. [quoting Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1997). The Beeler court wrote that district judges must "take seriously Congress's desire to accelerate the federal habeas process" and "only authorize extensions when this high hurdle is surmounted." Id. at 1289

Here, Petitioner contends that the statute of limitations should be subject to equitable tolling because extraordinary circumstances beyond his control made it impossible to file his petition timely. Specifically, Petitioner states that due to his lack of knowledge and training, in or about December 1998. he engaged a "jailhouse lawyer" to prepare his Petition For Habeas Corpus to be filed with this court. (Petitioner's Declaration In Support of his Traverse at 3) . Petitioner claims that at that time he gave the "jailhouse lawyer" his entire file. Thereafter, from February 22, 1999 to April 3, 1999, the prison was in a "lock-down" in which all "whites" were barred from using the law library, the typewriter, and from interaction with other non-white inmates. The "jailhouse lawyer" who Petitioner engaged is

white. Petitioner is considered "other." (Pet.Dec. at 4) . Petitioner therefore contends, that due to the lock down, his "jailhouse lawyer" was prevented from completing and filing Petitioner's petition until April 3, 1999.

Petitioner also asserts that only through outside counsel, retained with funds made available by a family member on March 26, 1999, was his petition able to be filed in this court on April 2,1999. (Pet.Dec. at 4)

Petitioner's allegations of his lack of sophistication, prison lock downs, and the difficulty in gaining access to the law library by his jailhouse lawyer, fail to meet the extraordinary

---------- FOOTNOTES ----------

5. Herein after referred to as "Pet. Doc.".

---------- END FOOTNOTES ----------

circumstances required for the statute of limitations to be equitably tolled. Petitioners familiar with the routine restrictions of prison life must take the possibility of lengthy lock downs into account when calculating when to file a federal habeas corpus petition. Atkins v. Harris 1999 WL 13719 (N.D.Cal. January 7, 1999); See Miller v. Marr 141 F.3d 976, 978 (10th Cir. 1998) cert denied 119 S.Ct. 210 (1993) . Prison lock downs and limited library access alone do not support a finding that the statute of limitations must be equitably tolled. "Rather, a petitioner must show that these circumstances actually impeded his ability to file a timely petition." Eco-Aguirre v. White 1999 WL 155694 (N.D.Cal. March 12, 1999) (emphasis added) . See also U.S. v. Van Poyck 980 F.Supp. 1108 (C.D.Cal. 1997). Here, Petitioner has shown that his "jailhouse lawyer" was unable to timely complete the petition due to lock downs at the orison. He does not contend that he himself was unable to file a timely petition. Moreover, Petitioner's alleged lack of legal sophistication does not excuse the delay in filing his

federal petition. Atkins, supra at *2.

As a result, the court finds that Petitioner has failed to establish that he is entitled to the tolling of the statute of limitations pursuant to the doctrine of equitably tolling. Accordingly the court declines to equitable toll the statute of limitations and finds that his Petition For Writ of Habeas Corpus filed with this court is untimely.

III

CONCLUSION

After a thorough review of the record in this matter, the Court has determined that Petitioner has failed to comply with the AEDPA's statute of limitations. 28 U.S.C.A. § 2244(d).

Accordingly, IT IS HEREBY RECOMMENDED that the Petition for a Writ of Habeas Corpus be DISMISSED as untimely.

This Report and Recommendation is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b) (1) (1994). IT IS ORDERED that no later than September 7. 1999, any party may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be served and filed no later than September 21, 1999. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v Ylst, 951 F.2d 1153 (9th Cir. 1991) .

IT IS SO ORDERED.

DATED: August 2, 1999

s/ LEO S. PAPAS
United States Magistrate Judge

cc: All Parties and counsel of Record
Judge Thomas J. Whelan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK J. MORALES, Petitioner,
vs.
ROBERT AYERS, WARDEN, Respondent.

Case No. 99-CV-0654 W (LSP)

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION; DISMISSING PETITION FOR WRIT OF HABEAS CORPUS; TERMINATING CASE

FILED
AUG. 2, 19990

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Mark J. Morales ("Petitioner"), a state prisoner proceeding pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his July 25, 1995 convictions for first and second degree murder. The matter was referred to the Honorable Leo S. Papas, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule HC.2.a. On August 12, 1999, Magistrate Judge Papas issued a Report and Recommendation ("Report") recommending that the Court dismiss the petition as untimely under 28 U.S.C. § 2244(d). For the reasons expressed below, the Court ADOPTS the Report in its entirety and DISMISSES the petition WITH PREJUDICE.

I. BACKGROUND

On July 25, 1995 a jury convicted Petitioner of first and second degree murder. Petitioner was sentenced to life without parole plus two additional consecutive life terms in prison. On February 13, 1996 Petitioner appealed his conviction and sentence to the California Court of Appeal, Fourth Appellate District.

On December 12, 1996 the Court of Appeal affirmed Petitioner's convictions but reduced his sentence to a term of life without parole plus one consecutive term of fifteen years to life. On January 14, 1997 Petitioner filed a petition for review with the California Supreme Court, which was denied on March 12, 1997.

Between June 2, 1998 and August 13, 1998, Petitioner filed three petitions for writ of habeas corpus with the California Superior Court, Court of Appeal, and Supreme Court. Petitioner's final state habeas petition was denied by the California Supreme Court on February 24, 1999.

On April 2, 1999, after exhausting both his direct and collateral appeals in the California state courts, Petitioner commenced this federal habeas corpus petition.

On August 2, 1999 Magistrate Judge Papas issued a Report recommending that the petition be dismissed as untimely. In the Report, Magistrate Judge Papas concluded (1) that Petitioner commenced this action four days after expiration of the one-year statute of limitations proscribed by the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)(1) (1996), and (2) that the circumstances of this case did not warrant application of the equitable tolling doctrine. (See Report at 9.) On September 1, 1999 Petitioner timely objected to certain portions of the Report, specifically those portions where Magistrate Judge Papas refused to recommend equitable tolling.

II. DISCUSSION

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Local Rule

HC.2.d.1, the Court has reviewed the petition, the Report, and all of the records and files in this case. The Court has reviewed those sections of the Report to which no specific objection is made to ensure that they are not facially erroneous, Pizarro v. *Bartlett*, *776* F.Supp. 815, 817 (S.D.N.Y. 1991), and has made a de novo determination of all portions of the Report to which Petitioner objects.

1. STATUTE OF LIMITATIONS

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") established for the first time a statute of limitations for federal habeas corpus petitions filed by state prisoners. The relevant limitations provision provides:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from ... –
>
> > (A) the date on which the judgment of conviction became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (2) The time during which a properly filed application for state postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. §§ 2244(d)(1)(A), (d)(2). In other words, the AEDPA statute of limitations (1) begins to run at the conclusion of all state court direct appeals; and (2) is tolled during the pendency of any post-conviction or collateral attacks in state court.

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1. Because Petitioner's conviction became final after the effective date of AEDPA, the statute's one-year limitations period applies to this petition. Lindh v. Murphy, 521 U.S. 320, 326 (1997).

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Close review of the Report reveals that Magistrate Judge Papas gave Petitioner the benefit of all doubt in calculating the relevant dates, resolving all factual and legal ambiguities in Petitioner's favor, and nonetheless found the petition untimely. The Report detailed the following events:

1. March 12, 1997 (Wednesday). The California Supreme Court denies direct review of Petitioner's July 1995 convictions.
2. June 10, 1997 (Tuesday). The 90-day period for filing petition for certiorari with the United States Supreme Court expires. AEDPA statute of limitations begins to run.2
3. May 22, 1998 (Friday). Petitioner signs his first state petition for writ of habeas corpus and files it in Superior Court.
   AEDPA statute of limitations stops running.3
4. February 24,1999 (Wednesday). The California Supreme Court denies Petitioner's final state petition for writ of habeas corpus.

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2. Magistrate Judge Papas calculated the beginning of the limitations period to be June 10, 1997 by applying the Eighth Circuit's decision in Smith v. Bowersox 159 F.3d 345 (8th Cir. 1998), where the court held that AEDPA's one-year statue of limitations is triggered at the date of

conclusion of all direct appeals in the state system plus the expiration of the 90.day time frame for filing a petition for certiorari in the United States Supreme Court, if a petition is not filed. Id. at 348. The Tenth Circuit has disagreed, holding that AEDPA's one-year statute of limitations is not tolled by the 90-day period for filing a petition for certiorari. Rhine v. Boone, 182 F.3d 1153 (10th Cir. 1999). The Ninth Circuit has not yet ruled on this issue.

3. The Report also gave Petitioner the benefit of the "mailbox rule" and the "prison delivery rule," which provides that court documents filed by pro se prisoners are deemed filed at the time petitioner hands them to prison officials for delivery. See Houston v. Lack, 487 U.S. 266, 276 (1988); Faile v. Uphohn 988 F.2d 985, 988 (9th Cir. 1993). Arguably, Magistrate Judge Papas was not even required to give Petitioner the benefit of these rules since Petitioner was assisted by counsel during his first and final state habeas petitions.

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5. March 3, 1999 (Wednesday). Earliest date Petitioner alleges to have received the California Supreme Court's order denying his petition for writ of habeas corpus. AEDPA statute of limitations begins to run again.
6. March 22, 1999 (Monday). Expiration of AEDPA one-year statute oflimitations.
7. March 26, 1999 (Friday). Petitioner signs his federal petition for writ of habeas corpus.
8. April 2, 1999 (Friday). The Clerk of Court file-stamps Petitioner's federal petition.

Using these dates, Magistrate Judge Papas concluded

that the one-year statute of limitations was:

- Not tolled between June 10, 1997 (the last day to file a petition for certiorari with the United States Supreme Court) and May 22, 1998 (the signature date of his first state petition for a writ of habeas corpus) (346 days):4
- Tolled between May 22, 1998 and March 3, 1999 (the first date Petitioner alleges to have received the order denying his state habeas petition); and
- Not tolled between March 3, 1999 and March 26, 1999 (the signature date of Petitioner's federal petition for habeas corpus) (23 days).

The Report concluded that a total of 369 (346+23) non-tolled days elapsed between

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4. See Nino v. Galaza 183 F.3d 1003, 1006 (9th Cir. 1999) (holding that the statue of limitations is not tolled from the time a final decision is issued on direct appeal and the time of the first state collateral challenge is filed because there is no case "pending" during that interval).

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June 10, 1997 and March 26, 1999 and that Petitioner therefore filed this petition four days late. (See Report at 6).

After exhaustively reviewing the petition, the Report, and all of the records and files in this case, the Court agrees with Magistrate Judge Papas' calculations and his conclusion that, giving Petitioner the benefit of all doubt, legal and factual, Petitioner failed to file this petition within AEDPA's one-year limitations period. The

Court also notes Petitioner does not challenge the accuracy of Magistrate Judge Papas' calculations or his conclusion that the petition is untimely absent equitable tolling. (See Pet'r Obj. at 1:16-18; Resp. Reply at 1.) The Court therefore holds that absent equitable toiling, the petition for writ of habeas corpus is barred by AEDPA's one-year statute of limitations.

2. EQUITABLE TOLLING

Petitioner contends that Magistrate Judge Papas erred in not recommending equitable tolling of the one-year limitations period. Petitioner asserts that facility lock-downs and actions by prison officials prevented him from timely filing his federal petition. (Pet'r Obj. at 2.)

The one-year period proscribed by AEDPA is a statute of limitations, not a prerequisite for federal jurisdiction. See Calderon v. United Stares Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997) overruled on ocher grounds by Calderon v. United States Dist. Court (Kelly), 163 F.3d 530, 540 (9th Cir. 1998) (en banc). The one-year time period is therefore subject to principles of equitable tolling. Id. at 1289.

In the Ninth Circuit, equitable tolling is available only upon a showing that "extraordinary circumstances" beyond a petitioner's control made it impossible to file the petition on time. Beeler, 128 F.3d at 1289. "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty 187 F.3d 1104, 1107 (9th Cir. 1999); see also Kelly, 163 F.3d at 541. Petitioner argues that equitable tolling is warranted because prison lockdowns prevented him from consulting with his "jailhouse lawyer," and separated him from his personal legal file.5 (Decl. of Pet'r in Supp. of Trav., at 4-6.)

A. EQUITABLE TOLLING - BACKGROUND

Petitioner states that on or about December 1998, due to his lack of legal experience, he sought the assistance of Mr. Thomas White, a "jailhouse lawyer," to assist in the preparation of his federal habeas petition. Petitioner alleges that he gave Mr.White his entire legal file at that time. (Pet'r Decl. at 3.)

On February 22, 1999 prison officials allegedly precluded all white prisoners from interacting with other prisoners until April 3, 1999 arid denied white prisoners access to the prison law library. As a result, Petitioner's jailhouse lawyer, a white person, could neither use the law library to prepare the federal petition nor directly consult with Petitioner. (Pet'r P. & A. at 11.) Petitioner thereafter independently retained an attorney and signed the current federal petition on March 26, 1999. (Pet'r Decl. at 4.)

B. EQUITABLE TOLLING - DISCUSSION

Petitioner contends that these facts support application of the equitable tolling doctrine because (1) due to lockdowns and other restrictions , Mr. White was denied from prison library access and from having contact with Petitioner between February 22, 1999 until April 1999, and because (2) Mr. White had possession of Petitioner's legal file during this rime. For several reasons, the Court agrees with Magistrate Judge Papas that Petitioner's allegations fall short of the extraordinary circumstances required to equitably toll AEDPA one-year statute of limitations.

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5. The Court rejects Petitioner's suggestion that equitable tolling should apply because Petitioner missed the filing deadline by only four days. The mere fact that the petition was filed shortly after expiration of the limitations period

does not affect the standard for equitable tolling. Cf. Sandvik v. United States, 177 F.3d 1269, 1272 (11th Cir.1999) (declining to equitably toll limitations period for petition filed two days late due to inefficient mail delivery). Regardless of whether Petitioner filed this petition four days late or four years late, he must still show that extraordinary circumstances prevented timely filing.

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First, many courts have recognized that habeas petitioners must take into account the routine restrictions of prison life, including lockdowns and limits on prison library access, in determining when to file a federal petition. Atkins v. Harris, 1999 WL 13719, at *2 (N.D. Cal. Jan. 7, 1999). In Miller v. Marr, 141 F.3d 976, 978 (10th Cir.), cert. denied, 119 S.Ct 210 (1998), the Tenth Circuit held that limitations on library access were insufficient to establish extraordinary circumstances. In United States v. Van Poyck, 980 F.Supp. 1108, 1111 (C.D. Cal. 1997), the court held that an inability to secure copies of transcripts from court reporters, lockdowns at the prison lasting several days and restriction of law library access were not extraordinary circumstances warranting equitable tolling. In Giraldes v. Ramirez-Palmer, 1998 U.S. Dist LEXIS 17573, at *2 (N.D. Cal. Nov. 3, 1998), the court similarly held that prison lockdowns are not extraordinary' circumstances. These cases suggest that the types of restrictions alleged here—lockdowns, lack of access to the prison library, and restricted contact with other inmates—do not qualify as extraordinary circumstances justifying application of equitable tolling.

Second, Mr. White's inability to access the prison law library does not constitute extraordinary circumstances because there is no indication that the library restriction applied to Petitioner or that the restrictions could have impeded Petitioner's ability to file

a timely petition himself. See Paige v. United States, 171 F.3d 559, 560-61 (8th Cir. 1999) (refusing to apply equitable tolling where petitioner relied on another prisoner to draft his § 2255 habeas rather than preparing it himself). In fact, Petitioner concedes that, with the assistance of outside counsel, he completed and timely filed his first state habeas petition while separated from the rest of the prison population. (Pet'r Decl. at 2.); Eco-Aguirre v. White, 1999 WI. 155694, at *2 , (N.D. Cal. Mar. 12, 1999) (holding that lengthy lockdowns and limited library access did not impede a prisoner's ability to file a federal habeas petition since the petitioner filed two state habeas petitions during similar lockdown period). Petitioner secured an outside lawyer to file this and several other petitions on his own behalf, and could have done so in this case at an earlier date.

Third, Petitioner had three months prior to the February 1999 lockdown to work with his jailhouse lawyer on his federal petition. Still, Petitioner took no action with respect to his petition during those months. Petitioner waited until the last minute to seek the help of an attorney once it appeared that the lockdown would prevent him from working with his jailhouse lawyer.6

Fourth, Petitioner argues that prison officials failed to return his legal file from his jailhouse lawyer during the lockdown period, thereby rendering timely filing or the petition impossible. (Pet'r. Obj. at 2.) in Miles, the Ninth Circuit held that a petitioner was entitled to equitable tolling where the he entrusted certain activities to prison officials which placed those activities out of his control. 187 F.3d at 1107. In contrast, Petitioner herein did not entrust his file to prison officials. In fact, Petitioner neither alleges that he asked the prison officials to return his file to him nor that the prison officials even knew Petitioner's file was in another's possession. Petitioner also does not explain why he could not file this petition without his legal file. Van Poyck, 980 F.Supp. at 1111 (declining to

equitably toll statute of limitations when petitioner could not obtain record transcripts of his trial). At the time Petitioner filed this federal habeas petition, he had already sought habeas review on three separate occasions in California courts, and was clearly aware of the issues he needed to raise in his federal petition.

Fifth, Petitioner inexplicably waited 346 days after his state conviction became final until he filed his first habeas petition in state court. This delay consumed almost all of AEDPA's one-year limitations period and occurred long before the February 1999 lockdown.7 Because of this delay in seeking state or federal habeas review,

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6. Petitioner did not secure the assistance of an attorney until March 26, 1999. four days after the limitations period expired on March 22, 1999.

7. Petitioner's last direct appeal in state court became final on June 10, 1997 and he filed his first habeas petition in California Superior Court on May 22, 1998. See Part II.1., supra.

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Petitioner left himself with only 19 days remaining in AEDPA's one-year limitations period.

For these reasons, it appears that Petitioner's own acts, rather than extraordinary circumstances beyond his control, caused the untimely filing of his Petition. Mile, 187 F.3d at 1107 (equitable tolling unavailable where untimely filing due to lack of diligence). Accordingly, the court declines to equitably toll AEDPA's one-year stature of limitations.

III. CONCLUSION

For the foregoing reasons, the court ADOPTS

Magistrate Judge Papas' Report and Recommendation in its entirety and DISMISSES WiTH PREJUDICE the petition for writ of habeas corpus. The Clerk of Court and dose the district court case file.

IT IS SO ORDERED.

DATE: November 3, 1999

s/ Judge THOMAS J. WHELAN
United States District Court
Southern District of California

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARK J. MORALES,

Petitioner,

vs.

ROBERT AYERS, WARDEN,

Respondent.

Case No. 99-CV-0654 W (LSP)

ORDER DENYING APPLICATION FOR CERTIFICATE OF APPEALABILITY

FILED
DEC. 8, 1999

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

I. BACKGROUND

State prisoner Mark J. Morales ("Petitioner") filed a Petition for Writ of Habeas Corpus pursuant to 28 USC § 2254. Petitioner challenged his July 25, 1995, convictions for first and second degree murder. The matter was referred to the Honorable Leo S. Papas, Unite States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule HC.2(a).

On August 2, 1999 Magistrate Judge Papas issued a Report and Recommendation ("Report") advising the Court to dismiss the petition as untimely under 28 U.S.C. § 2244(d). Tn the Report, Magistrate Judge Papas

concluded (1) that Petitioner commenced this action four days after expiration of the one-year statute of limitations proscribed by the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(d)(1), and (2) that Petitioner failed to demonstrate extraordinary circumstances warranting application of equitable tolling.

On September 1, 1999 Petitioner filed timely objections to portions of the Report and Recommendation. Although Petitioner

did not challenge the Magistrate Judge's determination that the petition was filed late, he argued that the Magistrate Judge erred by declining to recommend equitable tolling of the statute of limitations. By order dated November 3, 1999 this Court adopted Magistrate Judge Papas' Report and Recommendation in its entirety. In its order, the Court agreed with the Magistrate Judge that Petitioner had failed to show extraordinary circumstances warranting equitable rolling.

On December 3, 1999 Petitioner, now proceeding through counsel, filed an application for a Certificate of Appealability.

II. LEGAL STANDARD

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a state prisoner may not appeal the denial of a § 2254 petition without obtaining a Certificate of Appealability from a district or circuit court judge. 28 U.S.C. § 2253(c)(1)(A); United States v. Asrar 116 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue Certificates of Appealability under AEDPA). A Certificate of Appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Williams v. Calderon 83 F.3d 281 (9th Cir. 1996); Lowell v. Prunty 91 F.3d. 1358, 1359 (9th Cir. 1996). When evaluating whether to grant a

Certificate, the court must indicate which specific issue or issues satisfy the standard for issuing a certificate or stare its reasons why a certificate should nor issue. Asrar, 116 F.3d at 1270 (citing 28 U.S.C. § 2253(c)(3)). A Certificate of Appealability is a jurisdictional prerequisite to appeal. Gerlaugh v. Stewart, 167 F.3d 1222, 1223 (9th Cir. 1999).

A. CERTIFICATE OF APPEALABILITY -- PROCEDURAL ISSUES

The Court's November 3, 1999 order did not reach the merits of the instant petition because it concluded that the petition was barred by the one-year statute of limitations imposed by AEDPA. The Court therefore had no opportunity to pass on the merits of Petitioner's constitutional attacks on his July 1995 convictions.

The Ninth Circuit has not articulated the showing a petitioner must make to obtain a Certificate of Appealability under § 2253 where the petition is dismissed on a nonconstitutional procedural ground unrelated to the merits of the petition. The Fifth Circuit has held that a petitioner seeking a Certificate of Appealability in such circumstances must make a credible showing that the district court's procedural ruling was erroneous. Whitehead v. Johnson, 157 F.3d 384, 386 (5th Cir. 1998) (applying § 2253 to dismissal for failure to exhaust state remedies). The Third Circuit adopted the Fifth Circuit test and went one step further, holding that a Certificate of Appealability may not issue unless the petitioner demonstrates not only that the district court's procedural ruling was erroneous, but also makes "a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights." Morris v. Horn, 187 F.3d 333, 340 (3d Cir. 1999). Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999) (issuing Certificate of Appealability allowing state prisoner to challenge the district court's refusal to apply equitable tolling, but

doing so without analysis).

III. ANALYSIS

Petitioner's lengthy application attacks the Court's November 3, 1999 Order on the ground that the cases it cited and relied upon are either inapplicable or factually distinguishable. Petitioner's arguments for equitable toiling, reduced to their essentials, are based on (1) Petitioner's alleged lack of legal knowledge; (2) a lock down of white prisoners which impeded Petitioner's ability to consult with Petitioner's jailhouse lawyer, a white person; and (3) the jailhouse lawyer's lack of access to the prison law library. Petitioner also contends that the Court erred in failing to give great weight to the fact that the petition was late by only four days. Petitioner also places new emphasis on the acts of prison officials during the final days of the AEDPA statute of limitations, acts which Petitioner contends arc violative of numerous prison regulations and the First Amendment.

Having read and considered Petitioner's application, the Court stands by the previous orders issued by the Magistrate Judge and this Court that all of these circumstances, when taken together, do not rise to the level of extraordinary circumstances warranting tolling of the statute of limitations. The Court's decision was based on several factors. First, the Court noted Petitioner's lack of an adequate explanation as to why he waited approximately 346 days after the denial of his petition with the California Supreme Court before filing his first petition for habeas corpus in state court. This delay consumed all but 19 days of the AEDPA one-year statute of limitations and occurred long before the imposition of the lock down and I library restrictions applicable to his jailhouse lawyer. Mr. Thomas.(1)

More importantly, it is undisputed that the lock downs and library restrictions imposed on Petitioner's

jailhouse lawyer did nor apply to Petitioner himself As the Magistrate Judge indicated, although "Petitioner has shown that his jailhouse lawyer' was unable to timely complete the petition due to lock downs at the prison," Petitioner failed to show that "he himself was unable to file a timely petition." (See Report at 8:13-16 (emphasis in original)). Moreover, as this Court added, "Petitioner neither allege(d) that he asked the prison officials to return his file to him nor that the prison officials even knew Petitioner's file was in another's possession." (See November 3, 1999 Order at 9:13-14). Petitioner did not seek the aid of outside counsel until after the passage of the one-year statute of limitations on March 22, 1999. Nothing in Petitioner's lengthy and detailed application alters this analysis.

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1. Petitioner correctly notes in his application that the Court's order mistakenly refers to Petitioner's jailhouse lawyer as "Mr. White."

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Finally, the Court rejects Petitioner's recurring argument that equitable rolling is applicable because the petition was filed "only four days late." As discussed in the Court's November 3, 1999. Order, the Magistrate Judge gave Petitioner the benefit of all doubt and resolved all legal and factual ambiguities in favor of Petitioner in making the "four-day" calculation. For example, it is unclear (and unsettled in this Circuit) whether a district court can, as the Magistrate Judge did, delay the running of the statute of limitations during the 90-day period for filing a petition for writ of certiorari with the U.S. Supreme Court. (See November 3, 1999 Order at 4 n.2). It is equally unclear whether Petitioner should have been given the benefit of the "mailbox rule" for his state habeas petitions since he was apparently represented by counsel

during at least one of those petitions. (Id. n.3). Depending on the resolution of these questions, the Magistrate Judge conceivably could have concluded that the Petition was untimely by over three months. Neither the Magistrate Judge nor this Court found the need to consider these issues because, as discussed in the previous orders, the instant petition is untimely even if all of these issues are resolved in Petitioner's favor. Moreover, the Court noted previously an untimely habeas petition is barred absent equitable tolling regardless of whether it is filed "four days late or four years late." (Id. at 7 n.5). The mere fact that the petition was untimely by a short period adds very little to whether extraordinary circumstances beyond Petitioner's control prevented timely filing of the petition.

The Court therefore finds that Petitioner has failed to make a credible showing that the Court's November 3,1999 Order was erroneous.

IV. CONCLUSION AND ORDER

Accordingly, the Court concludes that a Certificate of Appealability cannot issue in this case because petitioner has not made a credible showing that the Court's procedural ruling was erroneous. Both the Magistrate Judge and this Court have fully and carefully reviewed the legal issues raised and found that his claims are time- barred. For these reasons, the court DENIES Petitioner's application for a Certificate of Appealability.

IT IS SO ORDERED.

DATE: December 8, 1999

s/ Judge THOMAS A. WHELAN
United States District Court
Southern District of California

cc: ALL PARTIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK J. MORALES, Petitioner,

vs.

ROBERT AYERS, WARDEN, Respondent.

No. 00-55245

DC# CV-00654-TJW

Southern California (San Diego)

ORDER

FILED

JULY 21, 2000

CATHY S. CATTERSON, CLERK

U.S. COURT OF APPEALS

Before:

T.G. NELSON and SILVERMAN, Circuit Judges.

The request for certificate of appealability is denied. See 28 U.S.C. § 2244(d)(1).

CALIFORNIA CODE OF REGULATIONS

Title 15, Crime Prevention and Corrections

Division 3, Department of Corrections

3160. Inmates access to the courts.

(a) Inmate access to the courts to file initial pleadings, as specified in section 3122(a), shall not be obstructed.

3163. Assisting Other Inmates

One inmate may assist another in the preparation of initial pleadings described in section 3122(a). Inmates are not restricted from assisting another inmate in the preparation of any kind of legal work except as described below in this section. However, in all cases of legal assistance provided by one inmate to another inmate the assisting inmate shall not receive any form of compensation for the assistance. Legal papers, books, opinions and forms being used by one inmate to assist another may be in the possession of either inmate with the permission of the owner. All papers must be returned to the respective owner or owners when other administrative action prevents direct communications between inmates. Inmates may be barred from giving legal assistance to other inmates when violations of regulations and established procedures relate directly to such activities. Inmates shall not be barred from giving or receiving legal assistance for violations of regulations and procedures which are unrelated to providing or receiving legal assistance. However, no other wise prohibited contacts or access to prohibited areas will be permitted because of this regulation.

3331. Conditions of detention.

(j). Legal Material.

Inmates undergoing disciplinary detention shall continue to receive the information necessary to file initial pleadings with the courts as specified in section 3122(a) ...

3343. Conditions of Segregated Housing

(n). Inmates confined in administrative segregation for any reason shall continue to receive the information necessary to file initial pleadings with the courts as specified in section 3122(a).

(p) If an inmate's housing restricts him or her from going to the inmate law library, arrangements shall be made to deliver requested and available law library material as specified in section 3122(a) to the inmate.